E.L.C. Electric, Inc. *and* International Brotherhood of Electrical Workers, AFL–CIO and All Trades Staffing, Inc.

E.L.C. Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 481, a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–28270–1, 25–CA–28270–2, 25–CA–28283–1 Amended, 25–CA–28283–2 Amended, 25–CA–28283–4 Amended, 25–CA–28398–1 Amended, 25–CA–28567, 25–CA–28582, 25–CA–28637 Amended, 25–CA–28397–1 Amended, 25–CA–28406, 25–CA–28532 Amended, and 25–RC–10131

July 29, 2005

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

An election was held September 26, 2002[1] in a unit of electricians employed by the Respondent, E.L.C. Electric, Inc.[2] The Union lost the election. It filed objections, alleging that the Respondent interfered with the election by ordering employees not to discuss the Union, providing pay raises to two employees during the critical period, offering to improve the employees' health insurance, and failing to post the Board election notices at its individual jobsites. Pursuant to charges filed by the Union, the General Counsel issued a complaint, alleging that the Respondent had violated Section 8(a)(1) and (3) of the Act in numerous respects prior to and after the election.

On April 7, 2004, Administrative Law Judge Ira Sandron issued the attached decision. The judge sustained the Union's objections regarding the order not to discuss the Union, pay raises, and failure to post election notices, but overruled the objection concerning the alleged promise of benefits. He also found that the Respondent committed many, but not all, of the alleged 8(a)(1) and (3) violations. The Respondent filed exceptions and supporting argument, and the General Counsel filed an answering brief. The Union filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[3] and conclusions as modified, to adopt the recommended Order as modified, and to adopt the judge's recommendation that the election be set aside and a new election held.[4]

For the reasons discussed below, we agree with the judge that the pay raises were objectionable. Unlike the judge, however, we also find that the Respondent interfered with the election and violated Section 8(a)(1) by

[1] Unless otherwise specified, all dates refer to 2002.

[2] The election was conducted pursuant to a Stipulated Election Agreement in the following appropriate unit:

> All Journeyman Electricians, Apprentice Electricians, Service Technicians, and Electricians Helpers engaged in electrical construction work in Bartholomew, Boone, Decatur, Hamilton, Hancock, Hendricks, Jennings, Johnson, Madison, Marion, Montgomery, Morgan, Putnam, Ripley, Rush and Shelby Counties employed by the Respondent; BUT EXCLUDING all managers, all warehouse employees, all delivery drivers, all sound and communication workers, all telecommunications technicians, all trenching equipment operators, all part-time help, all office clerical employees, all professional employees, and all guards and supervisors as defined in the Act.

The tally of ballots shows 11 for and 13 against the Petitioner with 6 challenged ballots. The judge sustained all six challenges, and no party has excepted. Accordingly, the challenged ballots cannot affect the results of the election.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons fully set forth in the judge's decision, we affirm his findings that the Respondent violated Sec. 8(a)(1) by telling an employee that it would try to keep its "loyal employees" in the face of upcoming layoffs and by on two occasions telling an applicant for employment that the Union was responsible for his not being able to obtain regular employment. We also affirm the judge's finding that the Respondent violated Sec. 8(a)(3) by laying off three employees and then the rest of the bargaining unit because of their union activities.

There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by telling an employee to complete a health insurance form, by creating an impression of surveillance, by its work assignment of union activists, and by interrogating an employee about his union affiliation; and violated Sec. 8(a)(3) by taking away an employee's gang box key and telling him to complete an insurance form, and denying reassignment of a laid-off employee to other work. There are no exceptions to the judge's sustaining of the Union's objection regarding the order not to discuss the Union. Nor are there exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule against discussing the Union on worktime, threatening a union activist with physical violence and other retaliation, isolating two union activists, soliciting a union activist to quit his employment, interrogating employees Adair and Grunde about the Union, and telling an employee that it was laying off employees because of problems with the Union; and violated Sec. 8(a)(3) by assigning two union activists more onerous work and isolating them and issuing a written warning to the Union's election observer immediately after the election.

[4] We have added a Direction of Second Election to the judge's Order.

impliedly promising to improve health insurance benefits.

Implied Promise of Benefits

In mid-September, the Respondent's vice-president for operations, Kevin Passman, and its general superintendent, Mike Swalley, addressed the employees at a mandatory meeting at one of its jobsites. During this meeting, they encouraged the employees not to vote for representation by the Union. After addressing the employees, Passman called for questions, and one employee asked if the Respondent was going to try to get better health insurance. Passman replied that the Respondent was actively seeking to improve employee health insurance benefits by the end of the year, but made no explicit promise of improvements.

In overruling the Union's objection, the judge cited *LRM Packaging*, 308 NLRB 829 (1992). He reasoned that Passman's comment did not constitute a promise of benefits because it did not expressly or implicitly associate an increase in the employees' benefits with their rejection of the Union in the upcoming election. He noted that the subject of health insurance was not addressed in Passman's presentation and was only raised by the employee question which Passman then answered. The judge also noted that the Respondent was required to change its insurance carrier by January 1, 2003 as a result of the settlement of a lawsuit. Contrary to the judge and our dissenting colleague, we agree with the Union that Passman's statement was an implied promise of improved benefits to the Respondent's employees.[5]

The Board will infer that benefits granted or promised during the "critical period"[6] prior to a representation election interfere with the employees' free choice. The employer may rebut this inference by providing a persuasive explanation, other than the pending election, for the timing of the grant or promise of benefits. *Dyncorp*, 343 NLRB No. 124, slip op. at 2 (2004); *B & D Plastics, Inc*., 302 NLRB 245 (1991). As the Supreme Court has aptly put it, "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). An employer's promise or grant of benefits during an election campaign also violates Section 8(a)(1). Id.; *Dyncorp*, supra, 343 NLRB No. 124, slip op. at 2.[7] To be objectionable and unlawful, a promise of benefits need not be explicit. See, e.g., *County Window Cleaning Co*., 328 NLRB 190, 196 (1999).

Applying these principles, we find that Passman's statement that the Respondent was actively seeking to improve employee health insurance benefits was unlawful and objectionable. First, the statement was an implied promise to improve benefits. *County Window Cleaning Co*., supra, 328 NLRB at 196 (employer's statement, inter alia, that "he was looking into insurance for the employees" constitutes an implied promise of benefits in context). Second, Passman made the statement during the critical period. Third, contrary to the judge, we find that the employees would reasonably have interpreted Passman's remarks as predicating the improvement of their health benefits on their rejection of union representation. Passman made the statement at the end of an antiunion speech at a mandatory employee meeting, and in the context of numerous other unfair labor practices. Passman did not refer in his speech to the settlement agreement that compelled the Respondent to change insurance carriers; indeed, the Respondent had never before mentioned the prospect of new health insurance benefits to its employees. Thus, the possibility of improved health benefits was broached entirely in the context of the Respondent's opposition to the Union. Consequently, the employees would reasonably tie the prospect of improved health benefits not to a settlement agreement of which they had no knowledge, but to rejecting the Union, which the Respondent was urging them to do then and there. Finally, the Respondent has offered no plausible reason for making this announcement during the critical period. *B & D Plastics*, supra, 302 NLRB at 245.[8]

[5] The Union also excepted to the judge's failure to find that this statement violated Sec. 8(a)(1).

[6] The critical period commences at the filing of the representation petition and extends through the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). The petition in this case was filed on July 29, and the election was held on September 26.

[7] The Board applies the same test to analyze promises and grants of benefits in both representation and unfair labor practice cases. *Niblock Excavating, Inc.*, 337 NLRB 53, 53–54 fn. 5 (2001), enfd. 59 Fed. Appx. 882 (7th Cir. 2003).

[8] We also disagree with the dissent's conclusion that the employer's statement was an "innocent casual remark" merely because it was given as a response to an employee's question. The fact that the statement in question was made in response to an employee question does not render it proper. The Board has held that: "It is clear that, under Section 8(c), an employer may lawfully furnish accurate information, especially in response to employees' questions, *if it does so without making threats or promises of benefits*." *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992) (emphasis added), remanded on other grounds, 117 F.3d 1454 (D.C. Cir. 1997). Accordingly, an employer is entitled to answer a question raised by an employee, but cannot do so in a way that indicates it would do more for employees if they remained unrepresented. *Angelica Corp.*, 276 NLRB 617, 623 (1985).

We find *LRM Packaging*, supra, on which the judge relied, distinguishable.[9] There, the Board found that the employer did not violate Section 8(a)(1) when its president stated at a preelection meeting that he would give employees a medical plan and a wage raise when the employer could afford it. The Board found that the statement only expressed the employer's hope that it would be in a position at some unspecified time in the future to improve the employees' working conditions. Significantly, the employer had made a similar promise to employees, and actually set into motion a grant of benefits, months *before* the union organizing campaign began. Under those circumstances, the promised improvements in *LRM Packaging* were not associated with the employees' rejection of the union. 308 NLRB at 829. Here, in contrast, the Respondent had not promised, let alone "set in motion," an improvement in health insurance benefits before the onset of the union organizing campaign. Indeed, the Respondent did not even begin to seek price quotes for a new plan until a month after Passman made his remarks.

Accordingly, we reverse the judge and find that Passman's statement constituted an unlawful promise of benefits that interfered with the employees' free choice in the election. We also find that the statement violated Section 8(a)(1) of the Act.

Grant of Pay Raises

The judge found that the Respondent granted pay raises to employees Mikalis Grunde and DeMarco Thacker shortly before the election in order to influence their votes, and that the pay increases constituted an additional ground for setting aside the election. For the reasons discussed below, we agree with the judge.

The Respondent hired Grunde and Thacker as apprentices and encouraged them to enroll in an apprenticeship program, which they did in June and July. (Classes in the program started around August 9). On September 11 and 18, respectively, the Respondent notified Grunde and Thacker that they would receive a wage increase to $11 per hour retroactive to September 9. Because the pay raises were granted during the critical period, an inference arises that they were coercive. *B & D Plastics*, supra, 302 NLRB at 245.

The burden thus shifted to the Respondent to come forward with a persuasive explanation, other than the pending election, for the timing of its action. Id. The judge found that the Respondent had failed to carry that burden. He observed that the Respondent's policy handbook did not indicate that an employee would receive a pay raise based on joining an apprenticeship program, and that the Respondent submitted no written evidence that it had a policy of giving pay raises for this reason or that it had done so in the past. Based on these circumstances, as well as the Respondent's numerous unfair labor practices, the judge concluded that the Respondent had not rebutted the inference that pay raises granted during the critical period were intended to influence the employees' votes.

In exceptions, the Respondent argues that Grunde testified that he was told at his job interview that he would receive a pay increase if he participated in the apprenticeship program. This testimony was consistent with the testimony of General Superintendent Mike Swalley that the Respondent routinely gave such increases when employees entered apprenticeship.

We reject this argument. To begin with, even if Grunde was promised a raise upon entering the apprenticeship program, there is no evidence that any such promise was made to Thacker. Indeed, Thacker testified that he did not recall being told by the Respondent's representatives that he would receive a raise once he enrolled in the apprenticeship program and that, to his knowledge, he was not scheduled to receive one.

Moreover, there is no record evidence to explain why the Respondent granted the raises when it did, i.e., well after Grunde and Thacker started the apprenticeship program and right before the election. Grunde was indentured on July 9, and Thacker on July 29, and neither received a raise at that time. Apprenticeship classes commenced around August 9, yet neither employee received a raise then either. Not until mid-September—only a week or two before the September 26 election—did the Respondent inform Grunde and Thacker that their pay was being increased. There is no evidence of any event other than the pending election that might have triggered the announcement at that time. In sum, the Respondent's rebuttal evidence does not explain the long delay between the employees' enrollment in the apprenticeship program and the conferral of the pay raises shortly before the election.[10]

Given the Respondent's failure to explain the timing of the pay raises, the absence of any written policy or any written evidence of a practice of raising the wages of apprentices, and the Respondent's commission of numerous unfair labor practices in September, we agree

[9] We disagree with the dissent's attempt to distinguish this case from *County Window*, supra. As discussed below, the delivery of this remark in the course of an antiunion speech given during the critical period reasonably would tend to cause the employees to associate improved health benefits with the rejection of the union.

[10] Further, the Respondent gave the raises retroactive effect only to early September—and not to the date of enrollment or the start of classes, as the logic of the Respondent's explanation would seem to dictate.

with the judge that the Respondent has failed to rebut the inference that the reason for granting the pay raises to Grunde and Thacker during the critical period was to influence their votes. Accordingly, the pay increases constitute objectionable behavior requiring that the election be set aside.[11]

Other Allegedly Objectionable Conduct

The Union notes that the Respondent told employees they could not discuss the Union on company time, that the judge found this to be objectionable conduct, and that the Respondent did not except to this finding. In the absence of exceptions to the judge's finding of objectionable conduct, we adopt the finding pro forma. The Union suggests that, in light of this unexcepted-to finding of objectionable conduct, the Board should overturn the election on the basis of this objectionable conduct without considering the other allegations of objectionable conduct. We do not adopt the Union's suggestion and rely upon all of the objectionable conduct in overturning the election.

Finally, as noted above, the judge found that the Respondent's interrogation of employee Ben Adair violated Section 8(a)(1) and there were no exceptions to this finding. The Union's objections did not refer to the interrogation and the judge did not address the issue of whether the interrogation constituted objectionable conduct. The Union here contends that the interrogation fell within the "catchall" language ("[b]y these and other acts") of its final objection and that the Board should set the election aside on this basis as well. Although administrative law judges and regional directors have the authority to set aside elections based on conduct other than that specified in objections, we find that the circumstances of this case do not warrant this action. Since we are already relying on three other grounds in setting aside this election, we find it unnecessary to reach beyond the specific conduct cited in the Union's objections.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, E.L.C. Electric, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(p) and reletter the subsequent paragraph:

"(p) Promising its employees improved health benefits in order to persuade them to abandon their support for the Union."

2. Substitute the following for the final paragraph:

IT IS FURTHER ORDERED that Case 25–RC–10131 is severed from the consolidated complaint cases, that the election conducted therein is set aside, and that Case 25–RC–10131 is remanded to the Regional Director for Region 25 to conduct a second election. A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Brotherhood of Electrical Workers, Local Union No. 481, affiliated with International Brotherhood of Electrical Workers, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election.

[11] Although only two employees were directly affected by the pay raises, the Union lost the election by only two votes. Clearly, the Respondent's action could have affected the election results.

[12] The Respondent excepts to the judge's finding that its failure to properly post the Board's election notices at individual jobsites justified setting aside the election. We also find it unnecessary to rely on the judge's finding in this regard because we are already setting aside the election on other grounds. Chairman Battista finds that the evidence does not prove the Respondent failed to properly post the election notice.

No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 29, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

Unlike my colleagues, I agree with the judge and would find that Kevin Passman's mid-September answer to an employee's question about health insurance was neither objectionable nor unlawful. As the judge pointed out, the complaint did not allege that anything Passman said in his prepared comments about the election was unlawful, and the Union did not contend that those comments interfered with the election in any way. Nor, in response to the employee's question, did Passman promise health insurance benefits. He said only that the Respondent was actively seeking to improve those benefits by the end of the year. Thus, Passman, after making some prepared comments during which he never mentioned benefits, responded spontaneously and truthfully to an employee's question, without making any promises or threats and without making any reference to the Union or to the employee's attitude toward it. In these circumstances, I regard Passman's response to the employee's question as an uncoercive; indeed, an innocent casual remark.

County Window Cleaning Co., supra, relied on by my colleagues, is factually quite distinguishable. There, Anthony Silvestri, the respondent's president, sole shareholder, and chief operating officer, had a conversation with three employees. At the time, Silvestri had unlawfully terminated one of them the day before and the other two immediately quit in protest. The three reported for work the next day on the union's instructions and asked Silvestri if he had any work for them. Silvestri said he did, but it would have to be without the union because he could not afford to join the union. The employees responded that they wanted to continue with the union to get better benefits. In response, Silvestri said that if it was just a few dollars more or 50 cents per hour, they could sit down and talk adding that he was also looking into insurance for the employees. He then urged them to think about their decision "really well." In addition to unlawfully conditioning employment of the three employees upon their abandonment of the union, the respondent was found to have unlawfully promised the employees benefits if they withdrew their support for the union. Passman's response to the employee's question in the case under review is hardly comparable to the clear and specific implied promise of benefits made by Silvestri. I would, accordingly, dismiss the allegation.

Dated, Washington, D.C. July 29, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing or soliciting on behalf of the International Brotherhood of Electrical Workers, Local Union No. 481 (the Union).

WE WILL NOT suggest physical violence against employees because they support the Union.

WE WILL NOT denigrate employees because they support the Union.

WE WILL NOT instruct employees not to discuss the Union with other employees.

WE WILL NOT isolate employees from other employees because of their support for the Union.

WE WILL NOT solicit employees to quit employment because they support the Union.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT interrogate employees concerning their union activities and sympathies.

WE WILL NOT promise our employees improved health benefits in order to persuade them to abandon their support for the Union.

WE WILL NOT tell employees they will be laid off because of their union activities.

WE WILL NOT tell prospective employees they cannot be hired because our employees engaged in union activity.

WE WILL NOT tell employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

WE WILL NOT assign more onerous working conditions to employees because of their union activities.

WE WILL NOT issue written warnings to employees because of their union activities.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT require employees to apply for employment through a labor provider.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and the layoffs will not be used in any way against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to DeMarco Thacker on September 26, 2002, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used in any way against him.

WE WILL reinstitute our practice of employing electrical employees as it existed prior to March 14, 2003.

E.L.C. ELECTRIC, INC.

Derek A. Johnson and *Rebekah Ramirez, Esqs.*, for the General Counsel.

Michael L. Einterz, Esq. (Einterz & Einterz), of Indianapolis, Indiana, for the Respondent/Employer.

Neil E. Gath, Esq. (Fillenwarth, Dennerline, Groth, & Towe), of Indianapolis, Indiana, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of the following related unfair labor practice and representation proceedings.

1. An order consolidating cases, consolidated complaint and notice of hearing issued on June 19, 2003,[1] and an amendment to consolidated complaint issued on August 8 (collectively, the complaint), against E.L.C. Electric, Inc. (ELC or the Respondent), based on charges filed by International Brotherhood of Electrical Workers, AFL–CIO and International Brotherhood of Electrical Workers, Local Union No. 481 (collectively, the Union).

2. A report on challenged ballots and objections, order consolidating cases, order directing hearing, and notice of hearing issued on December 23, 2002, following a petition filed on July 29 and an election held on September 26, in the following unit of employees stipulated to be appropriate: journeyman electricians, apprentice electricians, service technicians and electrical helpers engaged in electrical construction work in [named Indiana counties], excluding managers, warehouse employees, delivery drivers, sound and communication workers, telecommunications technicians, trenching equipment operators, part-time help, office clerical employees, professional employees, and guards and supervisors as defined in the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Indianapolis, Indiana, on August 20 to 22, and November 4 and 5, 2003, during which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I have duly considered the helpful posthearing briefs that were filed.[2]

Issues

1. Whether prior to the election, commencing in July 2002, ELC committed various independent violations of Section 8(a)(1) of the Act and discriminated against employees Jason Dunn, Brad Krebbs, and Corey Leineweber in assignments or conditions of employment, in violation of Section 8(a)(3) and (1).

[1] Because the operative dates occurred about equally in 2002 and 2003, specific mention of the year will be omitted when made clear from the context.

[2] The General Counsel's unopposed motion to correct transcript (GC Br. at p. 2) is granted.

2. Whether Dunn, Krebbs, Leineweber, George Nichols, and Robert Nichols in July 2002 went out on an unfair labor practice strike and should have their challenged ballots counted.

3. Whether ELC's unfair labor practices and other conduct warrant setting aside the election. The Union argues that, in addition to conduct alleged in the complaint, ELC gave pay raises to Mikalis Grunde and DeMarco Thacker in September 2002, and failed to properly post election notices at jobsites where employees worked.

4. Whether following the election, ELC engaged in further independent violations of Section 8(a)(1), and violated Section 8(a)(3) and (1) by issuing Thacker warnings and not assigning him work in September 2002, and by laying off Bruce Sanderson on January 9; Jonathan Trinosky on February 5; and Grunde on February 17, 2003.

5. Whether ELC violated Section 8(a)(3) and (1) by laying off all remaining electrical employees on March 14, 2003, and the following week, utilizing them as employees of labor providers to perform unit work (the transition).

Facts

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

Witnesses included:

1. All of the above-named employees, with the exception of George Nichols; and Benjamin Adair, an employee of ELC until March 14 and then of All Trades Staffing, Inc. (All Trades).

2. Steven Dunbar, union organizer.

3. Greg Maier, vice president of All Trades; Stephen Wise, president of National Construction Workforce (National); and Jerry Tucker, an employee of All Trades assigned to work for ELC both before and after the transition.

4. Edward Calvert, ELC's president and sole owner; Kevin Passman, vice president of operations and overseer of day-to-day operations, who is in charge of purchasing materials and estimating jobs; Mike Swalley, general superintendent, who is in charge of field activities, including labor, and has had primary responsibility for handling layoffs; and Supervisors James Corbly and Walter Freese.

The title of jobsite supervisors has varied, but their basic duties and responsibilities have remained the same at all times material. For ease of reference, the term "supervisor," will be used throughout this decision. The Respondent concedes their status as agents of ELC and statutory supervisors within the meaning of Section 2(11) of the Act.[3]

Supervisor Christine Patterson a/k/a Christine Rossittis was not called to testify by the Respondent, and no explanation was offered for her nonappearance. Therefore, I draw an adverse inference from its failure to call her as a witness. In any event, statements attributed to her by various witnesses of the General Counsel went unrebutted. The Union challenged her ballot at the election. Inasmuch as the Respondent now agrees that she has been a statutory supervisor at all times relevant,[4] and the record reflects such status, I sustain the challenge to her ballot.

On the other hand, neither the General Counsel nor the Union called George Nichols, who was the only witness who could provide direct evidence of the circumstances surrounding his termination of employment at ELC. In the absence of such testimony, and the Respondent's concomitant lack of opportunity to cross-examine him, I decline to find that he engaged in a strike.

ELC, a corporation with an office and place of business in Indianapolis, Indiana, is engaged as an electrical contractor in the construction industry and is a member of the Associated Building Contractors of Indiana (ABC). Its status as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act is not in dispute, nor is the Union's status as a labor organization within the meaning of Section 2(5) of the Act.

I. EVENTS PRIOR TO THE ELECTION

A. The Union's Organizational Efforts

Prior to the Union's organizing campaign, ELC became embroiled in a dispute with the Indiana Department of Labor, for allegedly not paying proper fringe benefits on common wage projects, and Calvert evidently placed blame on the Union. Thus, Calvert sent a letter dated June 10, 2002, to all employees,[5] decrying the department "for their vicious, defamatory, and harmful actions taken against our company," and accusing the department of being "pushed by their friends at IBEW." The closing paragraph concluded:

> They are trying to force us out of business, causing you to lose your job. If they succeed against ELC, they will then move on to the next non-union contractor and begin again with the same tactics. Maybe you will be working for this company then. Where does it end? *IT ENDS NOW*! Stand with me and fight against these corrupt and evil people who want to run our lives. (Emphasis in original.)

Dunbar began organizing efforts among ELC's employees in July 2002. On July 8, Krebbs agreed to be chairman of the organizing committee, and Dunbar sent a letter to the Respondent by telefax and certified mail.[6] Krebbs received a shirt with the union logo,[7] which he wore the following morning to work. From July 11 through 16 or 17, Dunbar engaged in passing out handbills and other literature to employees at the Wal-Mart super store, Columbus, Indiana (Wal-Mart). A number of employees subsequently called him in response.

On about July 15, Dunbar met with Dunn and Leineweber, who agreed to be on the Union's organizing committee. Dunbar notified ELC of this by a letter dated July 15 as to Dunn

[3] Tr. 33.

[4] Tr. 892.

[5] GC Exh. 2.

[6] GC Exh. 24. The fax was received on the morning of July 8; the certified letter on July 9. See GC Exhs. 24(b) and (c).

[7] See CP Exhs. 15(a) and (b).

and July 17 as to Leineweber, each sent by both telefax and certified mail.[8]

B. Alleged Violations of Section 8(a)(1) and (3) Prior to the Strike

The General Counsel contends that on about July 8, 2002, the Respondent changed the working conditions of Krebbs by taking away his assigned key, and on about July 8 and 10, assigned him more onerous working conditions, to wit, demanding he turn in health insurance papers and assigning him work that he could not complete in the time given. These allegations involve Swalley and Corbly.

Krebbs was tentative when it came to the exact dates of certain conversations with Swalley, and portions of his testimony were contradicted by documentary evidence. Thus, although Krebbs testified that he had one conversation with Swalley regarding submission of health insurance forms and that it occurred on either July 9 or 10, General Counsel's Exhibit 38 corroborates Swalley's testimony that they had two conversations on the matter; the first on July 8, and the second on July 9, and I so find. I further note that although Krebbs testified that he had never been asked to fill out insurance forms prior to July, General Counsel's Exhibit 37 is a letter to Krebbs dated June 5 from Darlene Van Treese, administrative assistant, in which she advised Krebbs that he would become eligible for medical insurance on July 18, and needed to return the application by June 21.

Corbly answered questions directly and struck me as generally credible. Swalley appeared ill at ease and, during portions of his testimony, did not give direct answers. Thus, as with Krebbs, Swalley was only partially credible.

It is further alleged that on about July 17 and 18, the Respondent, through Patterson, assigned more onerous working conditions to Dunn and Leineweber, by isolating them from other employees and assigning them cleanup work. Dunn and Leineweber appeared candid, and I credit their uncontroverted testimony about her words and actions, and their testimony in general.

1. Krebbs

Krebbs, a journeyman electrician, first worked for ELC as a temporary employee through National. When he became a permanent employee in January 2002, his first assignment was at the Sunman Elementary School Project (Sunman), where Corbly was the supervisor.

The circumstances surrounding Krebbs getting the key on March 1, 2002, and being asked to return it on July 8, 2002,[9] are generally not disputed. When Corbly instituted a night shift at Sunman, he assigned two employees, including Krebbs. Because Krebbs had been on the job longer, Corbly put him in charge of the night shift, informed him that would be the supervisor of the night crew, and gave him a key to the ELC lockboxes, in which tools and supplies were kept. The key also was used to enter the jobsite trailer.

The night shift lasted only 1 week, after which Krebbs was switched to day shift as a regular journeyman electrician. He continued to use the key to access tools and supplies. Corbly did not immediately ask for its return because it was helpful for Krebbs to have it when Corbly was absent from the site.

On July 8, Krebbs saw Swalley at Sunman. The first thing Swalley said was that Krebbs needed to return the lockbox key. Krebbs asked why, and Swalley responded that he (Krebbs) was not allowed to have it anymore. Both Corbly and Swalley testified that Krebbs was asked to give the key back because another employee needed it; specifically, Trinosky, who worked in the kitchen area at Sunman with another employee, was in charge of that area, and was responsible for locking up tools.

Although Krebbs testified that taking away his key aggravated him "a little bit," because he thought it was discriminatory and they were taking away his responsibility, the only impact was that it "slowed us down a little bit . . . [A]s far as me, it didn't affect my work at all."[10]

I credit Swalley's testimony concerning the circumstances surrounding his insistence that Krebbs fill out a health insurance election form. ELC offered health insurance benefits to its employees after a waiting period, and employees were then required to fill out forms either accepting or declining such insurance. Van Treese asked Swalley to remind Krebbs that he had to fill out the form, and Swalley did so on July 8. When Krebbs stated he did not have the forms, Swalley had Van Treese fax them to the site, and he gave them to Krebbs. The next morning, Swalley asked Krebbs if he had the insurance papers. When Krebbs replied no, Swalley stated that they were needed. He prepared and handed Krebbs a directive to bring the papers to work on July 10, or he would not be allowed on the jobsite.[11] Krebbs complied.

Krebbs testified that starting on about July 9 or 10, Corbly changed his assignments by assigning him to work alone and to jobs that he could not complete in the time given. However, he recounted only one such assignment: when he was given a job on July 10 to complete by July 12, which he believed would have taken six workers to finish. When Krebbs did not complete it by July 12, Corbly said nothing and gave him another assignment.

2. Dunn and Leineweber

Dunn worked as an electrical apprentice for ELC for 1 week in July 2002, until he went out on strike on July 19. The only jobsite he worked was Wal-Mart. On July 1, Leineweber started for ELC as an apprentice at Wal-Mart and worked there until he went out on strike on July 29.

The normal workday was 7 a.m. to 3:30 p.m. At the beginning of the workday, employees regularly gathered at the gangbox to receive their assignments from Patterson, the jobsite supervisor.

[8] GC Exhs. 25 and 26, respectively. Both letters were received by mail on July 17, whereas the fax for Dunn was received on July 16, and the fax for Leineweber on July 17. See GC Exhs. 25(b) and (c) and 26(b) and (c).

[9] The dates are established by GC Exh. 36, Krebbs' inventory list.

[10] Tr. 517.

[11] GC Exh. 38.

Both Dunn and Leineweber testified consistently that on July 12, the day after Dunbar began handbilling at Wal-Mart, Patterson mentioned at such a gathering that she realized the Union had been on the jobsite handbilling. She said she really did not care if they went union or not, but she did not want any union talk on company time.

It is clear from the testimony not only of Dunn, Leineweber, and Grunde but of Supervisor Freese, as well, that there was no previous policy in effect prohibiting employees from talking about personal matters during the workday. Freese was a credible witness, other than with regard to the circumstances surrounding the warning issued to Thacker on September 26, in which his superiors apparently intervened, and I credit his testimony where it differs from that of ELC management. Freese testified that his understanding of the no-solicitation rule in the ELC policy handbook (the handbook),[12] provided to employees, was that it prohibited people coming in to sell, and this was strictly enforced. However, he further testified that this rule did not prevent employees from talking on the jobsite and that they could talk about whatever they wanted, as long as it did not interfere with production. Freese further testified that in the 6 or so years he has been a supervisor, he has never had occasion to write up an employee for violating the no-solicitation rule.

After receiving a union shirt from Dunbar on July 15, Dunn wore it to work the following morning. At 9:15 a.m., Patterson pulled him off the job on which he was hanging lights with employee "Rorey." She took him to a private area and said, "I can't believe you're doing this. It's a slap in the face. I told you I didn't want any union guys on my job. I'd fire you if I could. I'm going to make sure everybody on this jobs knows you are a union mole working on this job, and nobody will look at you the same."[13] Dunn responded that he would continue to work the same and wanted no problems. Patterson told him to hang around the gangbox, and she called over the other 15–20 employees.

Dunn, Adair, Grunde, Leineweber, and Thacker all testified about what Patterson then said with all of the employees present. Their accounts were substantially similar, although not identical, leading me to conclude that their testimony was based on genuine recall and not "scripted." Because Dunn was the one she targeted, I believe he would have paid the most attention to her precise words, and he in fact appeared to have the most complete recall. Accordingly, I accept his version of Patterson's statements. I give no weight to the undated, unauthenticated memorandum Patterson purportedly wrote at some point concerning what she said at the meeting.[14]

Patterson said, "I want to introduce everybody to Jason Dunn. If you haven't met him already, he is our Union mole on this job. I want you to stay away from him and don't talk to him about the Union, don't let him get any of your personal information. . . . I'd fire him if I could, but I can't because he works for the Union."[15] She further stated that if there were any ditches or "crap" work to be done, he would be doing it, but there wasn't any. She concluded by telling other employees that they could not reach him on company time between 7 a.m. and 3:30 p.m. but "I don't care what you do to him after that. That's personal."[16] She asked Dunn if he wanted to comment, but he said no. The meeting ended, and Dunn went back to hanging lights.

Leineweber wore a union shirt to work the following morning, July 17. Patterson told him that she was not surprised that he was the other union mole. She then assigned him to work with Dunn, "so we couldn't spread the Union shit to other E.L.C. employees."[17] At about 9 a.m., Leineweber went to Dunn, who was hanging light fixtures with Rorey, and related what Patterson had said. For the rest of the day, Dunn and Leineweber worked together hanging light fixtures.

On the morning of July 18, before assignments were made, Patterson said to Leineweber that if he was going to go union, she did not understand why he did not just get out and go. That morning, Dunn and Leineweber resumed hanging light fixtures. At about 11 a.m., Swalley approached Leineweber and asked him if he had learned anything about "the fucking union" when he worked for a named employer. Swalley did not deny making this comment, and I credit Leineweber's uncontroverted account.

Later in the morning, after Dunn and Leineweber had hung light fixtures for about 2 hours,[18] Patterson pulled them off the lift without explanation and told them to sweep up the whole place and pick up trash. They engaged in such work for the remainder of the day. Cleanup work was a function rotated among employees. Previously, Leineweber had never performed cleanup, while Dunn had done cleanup in between assignments, for approximately 1/2-1 hour at a time and had seen others perform such work for similar periods. Although the pay was the same, both Dunn and Leineweber considered cleanup work less desirable because it required less skill. This was Dunn's last day of work for ELC. The next day, Leineweber was reassigned to hang lights with another apprentice.

At the morning gangbox meeting on July 19, Patterson approached Leineweber. She asked if Dunn had gone union and, if so, why Leineweber did not go with him.

C. The July 2002 Strike

By letters dated July 19, 2002, Dunn, Krebbs, George Nichols, and Robert Nichols advised ELC that they were going out on strike to protest ELC's unlawful labor practices.[19] Leineweber did the same by letter dated July 29.[20]

The July 19 letters stated:

> I am protesting the multiple unfair labor practices of E.L.C. Electric, Inc. E.L.C. has repeatedly discriminated against individuals in violation of the National Labor Relations Act. This unlawful conduct includes but is not limited to, the following incidents:

[12] GC Exh. 39 at p. 32.
[13] Tr. 752.
[14] GC Exh. 31.
[15] Tr. 754.
[16] Tr. 755.
[17] Tr. 268.
[18] See GC Exh. 34, job timesheet for Wal-Mart employees that week.
[19] CP Exhs. 8–11.
[20] CP Exh. 12.

1. E.L.C. has repeatedly harassed employee, Jason Dunn, in retaliation for his protected activities.

2. E.L.C. has repeatedly harassed employee, George Nichols, in retaliation for his protected activities.

3. E.L.C. has repeatedly harassed employee, Robert Nichols, in retaliation for his protected activities.

4. E.L.C. has repeatedly harassed employee, Brad Krebbs, in retaliation for his protected activities.

I request that E.L.C. fully remedy its unlawful conduct by removing all improper discipline from employee personnel records, by making all employees whole for all losses suffered by this discrimination, and by informing its workforce that E.L.C. will no longer discriminate against employees based on their union activities.

As of this date, I am commencing an Unfair Labor Practice Strike to protest the multiple Unfair Labor Practices committed by Edwards.[21]

Leineweber's letter was identical other than adding his name to the above listed employees.

Robert Nichols did not testify about any alleged harassment he received. As noted earlier, George Nicholas did not testify at all.

Krebbs' last day of work for ELC was July 19. Corbly testified without controversion that shortly before lunch that day, Krebbs told him that he had to go to the hospital to see his ailing mother and would get in touch when he would be able to return. Krebbs left at that point and never came back. Krebbs was off from work for 1 to 1-1/2 weeks and then went to work for another company, where he was employed for approximately 6 months.

On July 19, Dunn, George Nichols, and Robert Nichols went to the union hall and met with Dunbar. After signing letters that they were on strike, the three went with Dunbar to the Union's apprenticeship office, where they received placements with union companies. Dunn worked for his new employer 1 hour that day and began full-time employment the following Monday, July 22. Robert Nichols was placed with another union company, for whom he started on either Monday or Tuesday, July 22 or 23.

Leineweber's last day of work for ELC was on or about July 28. He went to work for a union employer on August 1.

The only actions taken by the five employees who went on strike were their signing letters and not returning to work for ELC. None of them ever carried a picket sign or had any further contact with ELC concerning the strike.

D. Other Preelection Allegations and Union Objections

1. Objection 1—alleged promise of benefits, interrogation, and impression of surveillance

These allegations involved employees Adair and Sanderson, and management representatives Passman and Swalley. The promise of benefits is the subject of Union Objection 1 to the election. My assessment of Swalley's credibility was previously set forth. Sanderson appeared candid, and I have no reason to doubt his credibility. Accordingly, his testimony is credited. More will be said about the credibility of Adair and Passman below.

In mid-September 2002, as part of ELC's preelection campaign, Passman and Swalley visited various jobsites to address employees. I credit Swalley, Adair, and Sanderson that Passman made preliminary statements about the election prior to asking for questions. In fact, Swalley specifically testified that Passman had "a written presentation" so there would be consistency in what he said at the different sites. In contrast, Passman was evasive when asked if he gave a speech prior to asking for questions, testifying that he could "not recall." The General Counsel does not allege that anything Passman said in his preliminary statements violated the Act, nor does the Union contend that any of those remarks interfered with the election.

After his remarks, Passman asked for questions. An employee asked if the Company was going to try to get better health insurance. Sanderson's and Adair's accounts of Passman's answer comported with Passman's account. Passman responded that ELC was actively seeking to improve health insurance benefits by the end of the year but made no promise thereof. At the time this occurred, ELC was required to change its health insurance carrier on January 1, 2003, as the result of the settlement of a lawsuit. ELC in fact switched carriers in November or December 2002.

Adair testified that after the meeting, Passman and Swalley asked him to accompany them around the side of the trailer, to talk in private. After saying it was "off the record," Swalley said he heard Adair was prounion. Adair replied no and asked who had said that, but Swalley did not answer. His conversation was not mentioned in Adair's April 15, 2003 Board affidavit, and he offered no explanation for its omission. However, neither Passman nor Swalley specifically denied the conversation. Adair never engaged in union activities as an ELC employee and has never been involved in any lawsuits with ELC. He struck me as candid. For example, he testified that Patterson at the September gangbox meeting told employees they could make up their own minds when it came to voting for the Union and vote the way they felt. This would have been inconsistent with an effort to skew his testimony to overstate her antiunion remarks. Similarly, his account of what Passman said at the group meeting demonstrated no apparent desire to show management animus toward the Union. In all of these circumstances, I credit Adair's account of what Swalley said to him, and his testimony in general.

The Regional Office opined that the allegation in paragraph 5(e) of the complaint might give rise to valid objections to the election. Thus, Thacker testified that on at least five different occasions in late July and early August, after he returned from lunch (sometimes with Dunbar), Patterson told him that he could not talk about the Union on the job. Since Patterson did not testify, this testimony went uncontroverted. The statements Thacker attributed to her were consistent with what she had told other employees, and I credit his account of them.

[21] The reference to Edwards Electric was, Dunbar testified, an inadvertent error as the result of using a previous letter as a model. I accept his explanation and draw no negative inferences against the strikers or the Union from that erroneous reference.

2. Objection 2—pay raises

Grunde and Thacker were hired as apprentices and later enrolled in a Bureau of Apprenticeship and Training (BAT) certified 4-year apprenticeship program. ELC encouraged but did not require such enrollment, except when the job was prevailing wage.

Thacker signed the apprenticeship documentation on July 9, 2002, and was indentured on July 29, whereas Grunde executed the documentation on June 24 and was indentured on July 9.[22] By letters dated September 11 and 18, 2002, respectively,[23] ELC notified them they would receive wage increases to $11 an hour (from $10.50 an hour), retroactive to September 9, because they were in the apprenticeship program. Thacker testified that he had not requested the increase and, to his knowledge, was not scheduled for it. Nothing in the handbook states that employees will receive raises upon starting classes, and the Respondent provided no documentation showing that other employees similarly situated have received them.

3. Objection 3—posting of election notice

Calvert had the notice posted in the main breakroom at the office and in the warehouse office, and he sent a certified letter dated September 6, 2002, announcing election details to every employee.[24] He testified that he understood the Company's obligation was to post it in a conspicuous place in its main business location, and ELC tried to do that. He did not give any instructions about posting the notice at ELC jobsites, and it was not posted at all of them. He conceded that employees did not report to the main office before going to their assigned jobsites each day.

II. THE ELECTION AND ITS AFTERMATH

The *Excelsior* list contained the names of 26 employees, including Corbly, Freese, and Patterson.[25] On September 26, 2002, 25 of them voted. Twenty-four voted without challenge, of whom 11 voted for the Union, and 13 against. The five alleged unfair labor practice strikers, who were not on the list, also cast challenged ballots. On October 3, the Union filed timely objections.

A. Alleged Discrimination Against Thacker

Thacker worked for ELC from July 11 or 12 until mid- or late December 2002, when he went out on strike. He was first assigned to Wal-Mart. He later also worked at Sunman and at Indian Creek School, Trafalgar (Indian Creek), where Freese was the supervisor. Indian Creek was his primary jobsite after early September.

Although Thacker earlier engaged in union activity, the first evidence of Company knowledge thereof was on September 26, when Thacker served as the Union's observer at the election. When Thacker showed up at Indian Creek after returning from the election, Freese handed him a written warning for missing work the previous day[26] and said that "the shop" had said to write him up. Thacker had never received any prior warnings for attendance, either oral or written (the handbook, at page 13, provides for progressive discipline, starting with a verbal warning).

It is undisputed that Thacker had to take his daughter to a medical appointment on the previous morning, September 25, and that he informed Freese of this in advance. However, with regard to other details of what occurred on September 25 and 26, neither Thacker nor Freese was fully credible. According to Thacker, Freese said he would call the shop and inform them that Thacker would be late coming in on September 25. Thacker further testified that, to his knowledge, he was not obliged to call the shop. However, in his April 8, 2003, Board affidavit, he stated, "Freese said that was fine and I just needed to call the shop and tell them."[27] Consistent with what Thacker stated in his affidavit, Freese testified that he told Thacker to call the office (Swalley) as per policy (see page 26 of the handbook). I find that Thacker's testimony on this point, impeached by his affidavit and contradicted by other evidence, undermines his credibility.

On the other hand, in marked contrast to his unequivocal and straightforward testimony in general, Freese's testimony regarding this incident was confusing, contradictory, and often tentative, leading me to conclude that Freese did not initiate the warning. Although Freese testified that the starting time was 7 a.m., he also testified that when Thacker called him on the early morning of September 25, Thacker said, "[H]e would be roughly, about two and a half hours late. He said he would be there at 10:30—no later than 10:30."[28] If the starting time was 7 a.m., the math simply does not gibe. Freese further testified that the reason Thacker was written up was because he arrived "much later than that [10:30] . . . I believe."[29] However, the warning report states, "Called in/But was on job at 10:30 a.m."

Also rather curiously, Freese testified that either Passman or Swalley had him prepare a written memorialization of the event,[30] addressed to Passman, which also stated that Thacker arrived at 10:30 a.m. but had said he would be "a couple" of hours late. On cross-examination, Freese averred that on no other occasion has he ever prepared such a formal written memorandum for an employee coming in late; rather, he merely notates it on the actual absentee report. It further strikes me as suspicious that although Thacker did come to work on the morning of September 25, the Respondent waited until the next day—and after Thacker served as the Union's observer—to issue him the warning.

On September 27, only Freese and Thacker were assigned to Indian Creek. When it appeared that, due to rain, the site was too wet for Thacker to work, Freese called Swalley to see if there was any other work available for him. Swalley said no,

[22] CP Exhs. 4 and 6, respectively.

[23] CP Exhs. 2 and 3.

[24] GC Exh. 4, a sample. The letter urged employees to remain "union free" and enclosed campaign propaganda.

[25] GC Exh. 3. As noted, the Union challenged Patterson's vote. It is problematic whether Corbly and Freese, who are also alleged in the complaint as statutory supervisors and whose status as such is not now in dispute, should have been allowed to vote.

[26] GC Exh. 47.

[27] Tr. 736.

[28] Tr. 815.

[29] Id.

[30] GC Exh. 48.

and Freese told Thacker to go home and call the next day. Swalley later asked Freese to memorialize the incident in writing and address it to Passman, and Freese did so.[31] When asked on cross-examination, if he ever prepared a similar document when an employee had not worked, either on account of weather or for any other reason, Freese replied no.

On at least one occasion, in late August or early September 2002, when weather was inclement and there was only outside work to do at Indian Creek, Freese sent Thacker and Grunde to Wal-Mart for the workday. However, on some occasions, Thacker candidly testified, he was sent home on rain days rather than assigned to other jobsites.

In late September or early October, Freese told Thacker at Indian School that they had no further work for him and would call him when work picked up. On his way home, Thacker called the shop. He spoke with Swalley, who said he could work at Sunman. Thacker reported to Sunman the next day and was there for about a week, before returning to Indian Creek.

Thacker last worked for ELC in December 2002 when, he testified, he went on strike. On cross-examination, however, it was revealed that in his affidavit to the Board, he stated, "I quit E.L.C. because I had a job at Barth Electric, a Union contractor."[32] He further stated therein that he started at Barth Electric on December 23, and that when he left ELC's employ, he merely said that he was not coming back. The Union never notified ELC that Thacker went out on strike, and neither the General Counsel nor the Union has contended that he was an unfair labor practice or economic striker.

B. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

Calvert and other ELC management and supervisors all testified that Swalley was the one who made decisions regarding when layoffs would take place and which employees would be selected. There was no set policy or criteria for determining who would be laid off.

1. Sanderson

Sanderson worked as a journeyman electrician for ELC from May 20, 2002, until January 9, 2003, when he was terminated. He worked at Wal-Mart under Patterson until September. At that time, he was reassigned to Sunman, where he remained until his layoff. Although he kept in contact with Dunbar after his hire, he did not overtly express support for the Union at work.

By letter dated November 5, 2002, faxed and sent by certified mail, the Union notified ELC that Sanderson was on the Union's organizing committee.[33]

I credit Sanderson's account of his meeting with Swalley on December 18, which was substantially corroborated by Sanderson's notes thereof,[34] over Swalley's testimony that he had no one-on-one conversations with employees the week of December 18. In this regard, Grunde also testified credibly that he had a performance review meeting with Swalley on December 18.

Swalley asked Sanderson to fill out a self-review. Sanderson commented that he did not feel Patterson cared much for him and did not think she would give him a fair review because of his union affiliation (Sanderson testified about accusations Patterson leveled against his performance in September, but they are not alleged as unfair labor practices). Swalley replied that was nonsense. Sanderson also stated that he felt he did not have a future with the Company and would be selected for termination because of his union affiliation. Swalley said that was "hogwash." He then repeatedly asked Sanderson if he was so prounion, why he went to work for a merit shop. Sanderson responded that he was not supposed to talk about the Union on company time, to which Swalley then said that other employees had complained about Sanderson talking about the Union, and his work had fallen off. Sanderson next stated that he was there to organize ELC. Swalley asked if it was fair that someone who just got hired should be able to force other people to go union. Sanderson replied that everyone had a vote. He asked Swalley if there was truth to the rumor of a layoff and how employees would be selected. Swalley answered, "Well, of course, we will try to keep all our loyal employees."[35]

At this meeting, Swalley stated that work was going to be slow in the months of January, February, and March. Swalley testified that he made a similar statement to Sunman employees as a group during the week of December 18. I find, therefore, that Swalley made such a statement to employees that week.

Swalley laid Sanderson off at Sunman on the evening of January 9, 2003.[36] There were about six employees on the project, including Eric Marshall, who was also laid off at the time; and Ron Hamilton, who was not. Sanderson believed that, according to company policy, he had more seniority than Hamilton, who had been incarcerated for a criminal conviction and therefore had a break in service. The handbook, at page 8, provides that "[a] break in service is when an employee has not worked for 60 days. All company benefits will be lost and He or She will then have to reapply to be considered for rehire." The Respondent did not rebut this testimony. Sanderson was never referred to a labor provider or recalled.

Swalley testified that Sanderson and the other journeyman on the job were laid off because work was slow, and Swalley no longer had need for journeymen on his jobsite. Rather, the work could be performed by Corbly and lower-paid apprentices.

Corbly, the jobsite supervisor, conceded on cross-examination that he was not certain if work was slowing down at the site at that time. This equivocation from the jobsite supervisor with much more firsthand knowledge of the job than Swalley seriously undermines Swalley's testimony. Additionally, strongly suggesting that any decrease in work in late 2002 and early 2003, was cyclical rather than out of the ordinary was Passman's testimony that during that period, projects were coming to the point where less manpower was required, "as it

[31] GC Exh. 49.
[32] Tr. 732.
[33] GC Exh. 28.
[34] GC Exh. 72.
[35] Tr. 688.
[36] See GC Exh. 41, termination report. It had the notation that Sanderson was "eligible for rehire if work picks up."

usually does, during that time of year."[37] This mirrors what Swalley told employees at Sunman in December.

Further undermining Swalley's testimony was his professed ignorance of the subject of ABC-required apprentice/journeyman ratios described in Charging Party's Exhibit 7, produced by the Respondent in response to a subpoena. He testified on cross-examination that he was not aware of such ratios and, moreover, did not even know who at ELC would be responsible for possessing such knowledge. It is inconceivable that a project manager of ELC, a member of ABC, who had primary responsibility for jobsite labor, would be so ignorant on this matter.

2. Trinosky

Trinosky was a journeyman electrician for ELC, first through National, from approximately September 2001 until March 5, 2002; and then directly as ELC's employee until February 2, 2003. His primary job assignments were at a K-Mart project, then Sunman and, finally, the Early Childhood School, Warren (Warren), where he was the supervisor until his replacement by Patterson in approximately mid-December 2002.

The General Counsel and the Union argue that Trinosky was never a statutory supervisory but a leadperson, and he testified that he considered himself the latter. However, Trinosky testified that he functioned in the same role as Corbly did. Thus, he assigned work to other ELC employees and coordinated the scheduling of work with the general contractor and other contractors on the job. He testified that in making assignments, he had to determine which employees could better perform the work. As I stated on the record, this reflects that he used independent judgment in making assignments, an indicia of supervisory authority under Section 2(11). Based on this and the record as a whole, I find that he was a statutory supervisor until his replacement by Patterson.

I note that Trinosky had a conversation with Passman a couple of weeks before the election, in which Passman told him *it was his job* to convince younger employees to vote against the Union. Presumably, if Trinosky were an employee, Passman's instruction would have constituted unlawful coercion and interference, but the General Counsel has not alleged it as a violation. Moreover, the General Counsel has not alleged that warnings Trinosky received in November and early December 2002, during his tenure as a supervisor, violated Section 8(a)(3). Inasmuch as these warnings, which related primarily to Trinosky's performance as a supervisor, are neither alleged in the complaint nor advanced by the Respondent as justification for his layoff, I need not address them further.

In any event, in approximately mid-December 2002, Patterson replaced Trinosky as the supervisor at Warren. He testified without controversion that his authority over other employees then stopped, although Patterson consulted with him on occasion. By letter dated February 3, 2003, sent and received by fax that day by ELC and also sent by certified mail, the Union notified ELC that Trinosky was on the Union's organizing committee.[38]

On February 5, 2 days later, Swalley laid Trinosky off.[39] Approximately 10 to 12 employees were working at Warren that day, including two journeymen who had more seniority than him. Trinosky testified there appeared to be at least another 3 months of work remaining on the project. He was never recalled or offered referral to a labor provider.

Swalley testified that Trinosky was a supervisor at the time of his layoff, and ELC no longer needed his services. However, prior to Trinosky's layoff, he had already been replaced by Patterson as supervisor and had resumed status as a journeyman electrician.

3. Grunde

Grunde was employed by ELC from mid-June 2002, until his layoff on February 17, 2003. His primary work locations were Wal-Mart and Indian Creek. Patterson was his supervisor at the former; Freese at the latter.

In November 2002, Dunbar asked him to be a member of the union organizing committee, he agreed, and the Union notified ELC accordingly, by letter dated November 25.[40]

Grunde testified that in December 2002, when he was meeting with Swalley concerning his scheduled personnel review, Swalley said, "We got the letter. Can you tell me what this letter means to you?"[41] Grunde replied that he was officially supporting making ELC a union shop. Grunde's recall of Swalley's response was not precise, but Grunde indicated that Swalley expressed unhappiness over the Union's organizing effort but said it was not directed against Grunde in any form.

On the day Grunde was laid off at Indian Creek,[42] Swalley stated that things were slowing down and they had to lay off some people. He further said that things might pick up in a month or so when the project moved forward. There were 7 employees at the jobsite that day (previously, the number had varied from 3 to 10). At the time of Grunde's layoff, ELC retained five employees with less seniority who were making the same or a higher hourly rate than Grunde.[43] Grunde was never referred to a labor provider or recalled.

Swalley testified that Grunde was laid off because work at the jobsite was "moving a little slow and I really didn't need anyone of his skill level."[44] Swalley went on to explain that he did not consider Grunde to be "mechanically inclined." Any claim that Grunde's performance had anything to do with his selection for layoff is undermined by the fact that Grunde had been employed since June 2002, and the Respondent furnished no evidence that he had ever received any verbal or written warnings concerning the quality of his work.

[37] Tr. 901.
[38] GC Exh. 30.
[39] See GC Exh. 46, termination report. It had the same notation as Sanderson's.
[40] GC Exh. 29, faxed and sent by certified mail that day.
[41] Tr. 329.
[42] See GC Exh. 40, termination report, containing the same notation as Sanderson's and Trinosky's.
[43] See GC Br., app. A.
[44] Tr. 966.

C. The Layoffs of Remaining Employees and the "Transition" to Labor Providers

1. Use of labor providers prior to March 14, 2003

Meier of All Trades and Wise of National appeared candid and forthcoming in answering questions, and they provided documentation corroborating their testimony. I also credit Freese and Corbly regarding the use of labor provider employees at their jobsites before and after the transition.

All Trades contracts labor in the construction industry and has had ELC as a customer or client since approximately August 2000, providing it with electrical labor.[45] National has contracted electrical labor to ELC since the middle of 2001.[46]

All Trades and National operate very similarly. Both pay the employees they refer, determining hourly pay rates using such factors as the type of job, prior earnings, experience, and assessed skills. They also pay their employees various fringe benefits and handle payroll and administrative functions. All Trades and National do not provide jobsite supervision or large tools or equipment, which remain the responsibilities of the client. Clients are able to direct referred employees to projects where they are needed.

Both companies charge a client with what is called a "multiplier"—a billing rate times the hourly rate paid to the employee.[47]

Prior to the transition, employees of All Trades and National were used occasionally, when the workload was greater than ELC's own employees could handle. The number of All Trades employees used by ELC varied. Some months, there were none; at other times, there could be 10 or 12. At Indian Creek, temporary employees were used when needed. They worked full 40-hour weeks but only for short periods of time. Prior to the March 2003, all of the Sunman electricians were ELC employees.

2. The transition

ELC employed about 15 electricians (helpers, apprentices, and journeymen) as of March 14, 2003, the date of the transition to labor providers. On or about March 7, ELC mailed to employees a letter notifying them of the transition.[48] It opened by saying, "The fluctuations in our work load and the need for flexibility is causing ELC Electric to transition its business practices" and went on to state that some of the work force would be added to the management team, while all other employees would be offered assistance in locating to labor providers. Enclosed was a placement assistance form to complete and return to ELC, which would forward it to a labor provider.

On March 14, 13 electrical employees were laid off, including Adair and Tim Grow. General Counsel's Exhibit 12 is a sample of the termination letter that they received. Two previously nonsupervisory employees—Clint Beck and Josh Graham—were promoted to supervisors and continued in that capacity as ELC employees. ELC retained its managers, Passman and Swalley; and its supervisors, Corbly, Freese, Patterson, and Richard Shuster. I credit Freese's testimony and find that the job duties of ELC supervisors did not change after the transition. Van Treese and other office personnel have also continued to remain ELC employees, and Calvert conceded that administrative overhead has stayed the same.

Swalley told Adair and Grow at the time they were laid off at the Lawrence Township Fire Department jobsite (Lawrence) on March 14, to report back to that location the following Monday. Swalley asked Adair to return the handbook, but not ELC's hat or safety glasses.

Adair and Grow, along with 10 of the other 11 employees laid off on March 14, returned to ELC jobs the following week as employees of All Trades. They remained under the supervision of ELC. Adair and Grow reported back to Lawrence. Adair later worked as an All Trades employee at other projects of ELC, including Indian Creek and Warren. He testified without controversion that when he worked for ELC as an All Trades employee, his rate of pay remained the same, he continued to go to Passman or Swalley with requests for vacation or other absence, and nothing changed other than the name of the issuer of his paycheck.

Since the transition, there have been an average of approximately 15 employees of labor contractors working at Indian Creek: approximately 80 percent are from All Trades, with the remainder from National. Indian Creek remains an ongoing project.

General Counsel's Exhibit 60 reflects that as of the week of July 23, 2003, 21 All Trades employees were assigned to ELC, to six different sites, including Indian Creek (11 employees). Seventeen of the 21, and all of those at Indian Creek, worked 30 or more hours that week. One of those employees was Tucker, who worked there full time for 4 or 5 weeks. After March 2003, two employees (more, if needed) from All Trades have been performing work at Sunman.

As reflected in General Counsel's Exhibits 63 and 64, in the months of June through August 2003, National provided four employees to ELC at Indian Creek. There are no National employees currently on ELC projects.

3. The reasons for the transition

Calvert, the sole owner and 100-percent shareholder of ELC, testified that he alone made the decision to implement the transition in March 2003. His testimony on the subject, consistent with his testimony in general, smacked of evasion, was replete with internal inconsistencies, and was frequently contradicted by other witnesses of the Respondent. Calvert demonstrated an attitude of defensiveness, sometimes crossing over into argumentative, and at times appeared to show a contemptuous indifference to providing responsive answers.[49] For these reasons, I

[45] See GC Exh. 19.

[46] See GC Exh. 23.

[47] For All Trades, the current multiplier is 1.36 on straight rate, meaning that the client pays $1.36 per $1 paid to the employee, and 1.30 on overtime work. For prevailing or common wage jobs, the multiplier is 1.33 for straight time. See GC Exhs. 20, 21, and 62. For National, the multiplier ranges from between 1.45 and 1.60, based on the dollar amount and the length of time for the job.

[48] GC Exh. 11, a sample.

[49] For example, when asked when the transition occurred, he testified, "I believe, August or September [2002]" (Tr. 37), even though his counsel then immediately stipulated that it took place on March 14, 2003.

find his testimony about the transition unreliable and not to be credited. The following testimony reflects his patent unreliability as a witness.

Calvert continually professed lack of knowledge or uncertainty about matters that I would expect the sole owner and 100-percent shareholder of a small company to know. Thus, his testimony about his types of customers and the percentage of his business in each category was hopelessly confusing and vague. He could only make "a wild guess" what percentage of the business was for retail stores or what percentage was for institutional customers. Similarly, when asked whether he recalled when the Wal-Mart project and the Sunman project started and ended, Calvert said he could not.

As to when he decided to transition to labor providers, Calvert was evasive and ambiguous, as the following reflects:[50]

> A. We had—we had thought—about doing it several years ago. We had talked about it in various meetings, staff meetings . . . I can't give you an exact time and date when I started working on doing it.
>
> * * *
>
> Q. Who did you talk to in the staff meetings, and when was that?
>
> A. I don't have dates. And I don't have the exact people that . . . I had discussed things with.

Later, when asked for how long he had been planning the transition, he replied, for at least 1 to 2 years.

When asked how long it was between the time he made the decision to use labor contractors and when he communicated the decision to employees, he answered, "I can't tell you. I don't really know."[51]

When asked when he had discussions with All Trades about the transition, his response was, "I'm not sure about the dates."[52]

When asked how many ELC projects were going on in March 2003, at the time of the transition, his answer, once more, was, "I don't really know."[53]

When asked how many employees of labor providers ELC presently employs, he replied, "I don't know."[54]

When asked how many projects ELC currently is working on, he answered, "It could be five. There again, I don't really know."[55]

After he testified that ELC has used an outsource payroll company rather than ELC office personnel, he was asked when this started. He replied, "I'm not sure," and when next asked if it was under or over 2 years ago, again answered, "I'm not sure."[56]

Calvert also was frequently inconsistent in his testimony on important matters. Thus, he first testified that ELC had one major ongoing project at the time of the trial but later testified that he had to look at his books to determine if either Indian Creek or Southport is now the largest, clearly implying that there are two, not one, "major" ongoing project. Swalley also contradicted Calvert, testifying that ELC currently has four "large" school projects.

Calvert also shifted in answering why he decided to transition employees from ELC to labor providers. He initially testified that the reasons were for increased productivity and profitability, stating nothing about the workload at the time. Later, however, he testified the decision was made in March because "[o]ur workload was down with projects that we were finishing up."[57] Still later, however, he reverted to his earlier answer, and said that transition was made because, "First of all, health insurance was extremely high. There are so many employee laws and regulations anymore, we didn't feel like our present staff could keep up with them. . . ."[58]

Any claim by Calvert that workload played a role in the decision to implement the transition was totally undermined by Passman, who testified as follows.[59]

> Q. You said that at the time you made the transition to eliminate your whole labor force, that things were slowing down; correct?
>
> A. No, not at the time of the transition. I don't believe I said that.

Passman went on to say that the workload at the time of the transition was substantially the same as before. Passman's testimony on this was implicitly supported by Swalley's remarks to Adair on March 10, as will be described subsequently. I so find as a fact that the level of work was not down in March 2003.

Jerry Tucker, who is not a union member, has worked as a journeyman electrician for ELC through All Trades on several occasions. The most recent was from June 1 until August 12, 2003, when he was laid off.

Tucker had three conversations with Swalley regarding employment: the first was on December 31, 2002, at the ELC Tractor Supply, Greenfield site; the second and third were on January 7 and March 14, 2003, respectively, at Warren. Although his recollection of exact words was not precise, particularly in the first conversation, Tucker appeared sincere. While Tucker testified about three specific conversations with Swalley, Swalley could not recall any conversations with Tucker present in December or January, and in his testimony he did not address the March 14 conversation as related by Tucker, which therefore went unrebutted. For these reasons, I credit Tucker's testimony.

Swalley rarely spoke with Tucker, other than to greet him, but in December, Swalley initiated the conversation. Swalley stated that he wanted to hire Tucker and Wes Fink, another All Trades employee, but couldn't "because of all the union stuff." He further said that the Union wanted to run him out of business. Tucker, afraid of sounding prounion, responded to the effect that he thought the Union was unfair. In the January conversation, Swalley approached Tucker and stated that he

[50] Tr. 99–100.
[51] Tr. 102–103.
[52] Tr. 118.
[53] Tr. 113.
[54] Tr. 39.
[55] Tr. 127.
[56] Tr. 101.
[57] Tr. 171.
[58] Tr. 1015.
[59] Tr. 917–918.

wanted to hire Tucker and to get rid of a couple of other people for various reasons, but he couldn't just hire and fire whomever he wanted because he was afraid of getting sued by the Union.

After a layoff, Tucker was reassigned to Warren on March 14. That day, he told Swalley that he was glad to be back to work. Swalley responded that for all practical purposes, he was an employee of ELC. Swalley further said that Tucker and Fink were the kind of employees he wanted to keep. At Indian Creek, Tucker's last assignment for ELC, Freese was his supervisor.

Adair, an employee of ELC since July 8, 2002, testified that on March 10, 2003, Swalley came to him and Grow at Lawrence. He gave them enrollment forms for All Trades and said that they had to fill them out and give them back to him in order to continue working at the project. When Grow asked why, Swalley stated, "off the record," that ELC was doing this because of all of the pending lawsuits and the problems with the Union; Swalley also said that everybody but a few individuals who were going to be kept as managers had to switch to All Trades.

Swalley made a general denial about having any conversations about the Union that day but did not specifically deny the statements Adair attributed to him. When Swalley was asked what he told Grow and Adair on that occasion, he did not give a direct answer, testifying, almost apologetically, "Basically I was just as surprised as they were. I had just found out about it the day before. And I was just instructed to give them the letters. . . . We were all kind of confused as to what was going on . . . . It happened very quickly, it caught me by surprise."[60]

In light of my conclusion that Adair was a credible witness, as detailed earlier, and Swalley's somewhat nonresponsive answer, I credit Adair's version of what Swalley said regarding the reasons for the transition. Swalley's testimony about his reaction to finding out about the transition did seem spontaneous and genuine, and I credit it.

III. ANALYSIS AND CONCLUSIONS

A. The Respondent's Conduct Before the July 2002 Strike

I will first address the allegations in the complaint of independent violations of Section 8(a)(1) and then turn to the alleged discrimination against Krebbs, Dunn, and Leineweber.

Paragraph 5(a) relates to Swalley telling Krebbs at Sunman on about July 9, 2002, that he had to complete insurance forms. Although the complaint alleges that Swalley "informed employees they would be discharged unless they completed insurance forms because those employees engaged in union activity," the record does not reflect that Swalley said anything about union activity in his conversations on the subject with Krebbs, either directly or indirectly. Accordingly, I recommend dismissal of this allegation.

Paragraphs 5(b), (c), (d), and (k) all relate to Patterson's conduct at Wal-Mart in mid-July. In her conversations with employees at the gangbox on July 12 and 16, Patterson told them that they could not talk about the Union on worktime. There is no evidence that employees were previously told they could not talk about nonwork matters on company time and, indeed, Supervisor Freese testified that employees were permitted to talk about anything they wanted on the jobsite, as long as it did not interfere with production. Patterson never notified employees that she was rescinding the new rule. Accordingly, Patterson, by promulgating and maintaining a rule prohibiting employees from discussing or soliciting only on behalf of the Union violated Section 8(a)(1). See *ITT Industries*, 331 NLRB 4 (2000); *Emergency One*, 306 NLRB 800 (1992). Therefore, I sustain the allegation in paragraph 5(b).

Patterson singled Dunn out, both one-on-one and before a group. She called him a union "mole"; told other employees not to talk to him about the Union, to stay away from him, and to avoid giving him personal information; said she would fire him if she could; said she would give him "crap work" if there was any to be done; and finished by saying that other employees could not "reach him" on company time but "I don't care what you do to him after that." I find that her statements, all directed against Dunn, included an implicit threat of physical violence (indeed, she seemed to encourage it), an implicit threat of more onerous work assignments, denigration, and an instruction to employees not to discuss the Union with him. Accordingly, I sustain all of the allegations in paragraph 5(c).

Paragraph 5(d) relates to Patterson's assigning Dunn and Leineweber to work together on July 17. Leineweber testified without controversion that Patterson told him he was being assigned to work with Dunn, "so we couldn't spread the union shit to other E.L.C. employees." I find sustained allegation (d)(i), that she told employees they were being isolated because of their support for the Union. Subparagraph (d)(2) further alleges that by isolating them, Patterson created the impression among employees that their union activities were under surveillance. However, prior to this, both Dunn and Leineweber wore union shirts to work, and the Union sent letters to ELC stating that they were on the organizing committee. Their union affiliation therefore was open and known, rather than covert. Patterson said nothing to suggest that her knowledge of their activities was based on anything else. Contrast, *Peter Vitale Co.*, 310 NLRB 865, 874 (1993). Accordingly, I recommend this allegation be dismissed.

Paragraph 5(k) concerns Patterson's statements to Leineweber on July 18 and 19. The first was that if he was going to go union, she did not understand why he did not just leave; the second, that if Dunn had gone union, why Leineweber did not go with him. The General Counsel alleges this constituted solicitation to quit his employment. Although I would characterize her statements as implied threats of termination (see *McDaniel Ford*, 322 NLRB 956 (1997)), I conclude that they also amounted to such solicitation and therefore violated Section 8(a)(1) on that basis.

Turning to the allegations of discrimination, the framework for analysis is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or

[60] Tr. 951–952.

circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of such animus.

Direct evidence of an antiunion motive in discharge cases is often lacking and, for that reason, reliance on circumstantial evidence, and reasonable inferences deriving therefrom, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75–76 (8th Cir. 1969). Thus, "Illegal motive has been implied by a variety of factors such as 'coincidence in U activity and discrimination.' . . . 'general bias or hostility toward the union' . . . 'variance from the employer's normal employment routine' . . . and 'an implausible explanation used by the employer for its action' . . . ." *McGraw-Edison Co. v. NLRB*, id. at 75.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 US 393, 399-403 (1983); *Kamtech v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

Prior to the actions of the Respondent alleged to be discriminatory, Krebbs, Dunn, and Leineweber all had engaged in union activity, and the Respondent was aware of such. Thus, Dunbar faxed a letter to ELC on July 8, 2002, stating that Krebbs was chairman of the organizing committee, and faxed letters to ELC on July 15 and 17, stating that Dunn and Leineweber were on that committee. Moreover, before any action was taken against Dunn and Leineweber, they had worn their union shirts to work.

Specific animus directed against Dunn and Leineweber is evidenced by Patterson's 8(a)(1) statements to them. Indeed, Patterson expressly told Leineweber on July 17 that she was assigning him to work with Dunn so they would not "spread the union shit" to other employees, and on the morning of July 18, both Patterson and Swalley made remarks to him expressing antiunion animus.

As to Krebbs, animus can be inferred from the fact that the conduct against him occurred almost immediately after the Respondent learned of his union activity and the animus previously demonstrated by Patterson. ELC is small company run by Calvert as the sole owner, and I believe that Supervisor Patterson's statements about the Union were made not sua sponte but with the approval, express of tacit, of higher management.

The actions taken with regard to Krebbs included management's asking for the return of his lockbox key, Swalley demanding he complete health insurance papers, and Corbly giving him an assignment that he could not complete in the time he was given. Regarding Dunn and Leineweber, Patterson isolated them from other employees and assigned them to work together on cleanup.

The threshold issue regarding Krebbs is whether the actions taken against him were adverse. As to Swalley's taking away his key, Krebbs testified that it aggravated him "a little" but had no effect on his work. Regarding the job assignment on July 10, which Krebbs did not finish in time, Corbly said nothing about his failure to complete it, issued no warning, and instead merely gave him another assignment. Krebbs continued working for ELC until on about July 19, when he went out on strike. I conclude that these actions of the Respondent did not rise to the level of acts of discrimination violating Section 8(a)(3).

On the matter of the health insurance papers, Krebbs testimony was not credible. Although he denied having being told earlier that he had to fill out an election form, Van Treese had sent him a letter dated June 5, specifically asking him to do so by June 21. In any event, I find it difficult to see how telling an employee to complete an election form, accepting or waiving a fringe benefit, has any kind of coercive or otherwise negative impact on the employee. Assuming arguendo that the Respondent's insistence that Krebbs fill out the form was an adverse action, based on Van Treese's letter and Swalley's testimony, I conclude that the Respondent acted in conformity with its normal practice and had a legitimate business reason, to wit, documentation of an employee's wishes. I therefore conclude that the Respondent has met its burden of persuasion of showing that it would have demanded Krebbs submit the form in the absence of his union activity.

Based on the above analysis, I conclude that the allegations of discriminatory conduct against Krebbs should be dismissed.

Turning to Dunn and Leineweber, I credit the latter's testimony that Patterson told him on the morning of July 17 that she was assigning him to work with Dunn to prevent them from talking about the Union to other employees. Patterson did not testify, and the Respondent has failed to meet its burden of persuasion of showing that they would have been segregated absent their union activity. Accordingly, this violated Section 8(a)(3) and (1).

Concerning Patterson's assignment of Dunn and Leineweber to sweep and otherwise clean up on July 18, cleanup was a task rotated among employees. However, the timing of the assignment vis-à-vis statements that Patterson and Swalley made to Leineweber that morning raises a strong inference that the action was motivated by animus. Patterson did not testify, and I conclude that the Respondent has failed to meet its burden of persuasion of showing it had a legitimate business reason for pulling Dunn and Leineweber off their electrical job and having them perform the less desirable work of cleanup for the remain-

ing 6 hours of the workday. See *L.S.F. Trucking*, 330 NLRB 1054 (2000); *Bestway Trucking*, 310 NLRB 651 (1993). Therefore, I conclude that this assignment constituted unlawful discrimination in violation of Section 8(a)(3) and (1).

B. The Strike in July 2002

The above conduct of ELC constitutes the sole evidence of employer action alleged to have constituted prestrike unfair labor practices. The Union's letter of July 19, 2002, announced that Dunn, Krebbs, George Nichols, and Robert Nichols were going out on strike, due to discrimination against each of them. However, although Robert Nichols testified, he did not testify about any actions taken against him by ELC, and the record does not reflect any actions taken against George Nichols. The letter of July 29 regarding Leineweber going out on strike added his name to the list of alleged discriminatees.

As I stated at the trial, the fundamental issue here is whether the above-named employees went out on "strike." The Taft-Hartley Act added a definition of "strike" to the Act that reads as follows:

> (1) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.[61]

In determining the existence of strike activity, the Board has distinguished between an employee's withholding of services pending desired remedial action by the employer, and abandonment of employment with no intention of returning. The latter activity, whether undertaken individually or in concert, is unprotected. *Greyhound Food Management*, 198 NLRB 1146 (1972); *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861–862 (1953). This is so even if the concerted action resulted from dissatisfaction with wages or working conditions (*Essex International*, 222 NLRB 121 (1976); *Eaborn Trucking Service*, 156 NLRB 1370 (1966)), or it was in protest of the discharge of another employee (*Fashion Fair*, 163 NLRB 97 (1967)).

George Nichols did not testify about the circumstances surrounding his cessation of work for ELC, and I therefore conclude that he has failed to show that he was a striker. Corbly testified without controversion that Krebbs stated that he had to stop working because his mother was in the hospital and that he would get back in touch when he would be able to return to work. Krebbs, in fact, went to work for another company about a week or so after he left ELC. I conclude in these circumstances that Krebbs voluntarily quit his employment rather than became a presumptive striker.

I now address the remaining strikers: Dunn, Leineweber, and Robert Nichols. Almost simultaneously with their signing of letters to ELC that they were going out on strike, all of them received union hiring hall referrals to union employers, for whom they began work almost immediately. After they left ELC's employ and sent the letters, they never took any other action in support of their purported strike, otherwise returned to ELC jobsites, or engaged in any other conduct evidencing an interest in ever returning to work for ELC. Obtaining employment *after* going on strike does not ipso facto establish that an employee quit his or her job. *Noel Corp.*, 315 NLRB 905, 909 (1994). Here, however, the employees got new jobs at the same time they ceased working for the Respondent. The close timing and other circumstances suggest that they knew they already had new jobs at the time they signed their letters to ELC.

In light of all of the above circumstances, I conclude that Dunn, Leineweber, and Robert Nichols voluntarily quit the Respondent's employ with no intention of returning, rather than engaged in a bona fide strike, whether characterized as unfair labor practice or economic. It follows that they were not eligible to vote in the September 26, 2002 election.

I therefore sustain the challenges to the ballots of all five alleged strikers.

C. The Respondent's Conduct After the "Strike" and Before the Election

Paragraph 5(e) concerns Patterson's telling Thacker on at least five occasions in late July and early August 2002, that he could not talk about the Union on worktime, a reiteration of the rule she announced at the gangbox in July. For reasons previously explained, I conclude that this violated Section 8(a)(1). I also conclude that constituted an additional basis for setting aside the election.

Paragraphs 5(l)(i) and (ii) of the complaint relate to the conversation between Swalley and Adair following the preelection meeting Swalley and Passman held with employees at Sunman on September 19. Swalley said that he had heard that Adair was prounion. Adair said no and asked who had said that. Swalley did not answer. I conclude that Swalley's statement created the impression of surveillance and implicit interrogation of Adair concerning his union sympathies (as reflected by Adair's response). Therefore, I sustain these allegations.

Turning to the Union's objections to the election, Objection 1 relates to paragraph 5(f) of the complaint, which alleges that Passman at the above-preelection meeting impliedly promised employees improved benefits if they did not select the Union as their collective-bargaining representative. The subject of benefits was not contained in Passman's presentation. Rather, an employee asked if the Company was going to try to get better health insurance, and Passman responded that ELC was seeking to improve employees' health insurance benefits. I conclude that his answer did not expressly or implicitly associate an increase in benefits with the employee's rejection of the Union. Therefore, I conclude that he did not unlawfully promise a benefit. See *LRM Packaging*, 308 NLRB 829 (1992).

Accordingly, I overrule Objection 1.

Objection 2 concerns the pay raises that were given to Grunde and Thacker in September 2002, presumably because they enrolled in the apprenticeship program.

The conferral of benefits to employees during the critical period is not per se grounds for setting aside an election. The focus of the inquiry is whether the benefits were granted for the purpose of influencing the employees' votes and were of a type reasonably calculated to have that result. *NLRB v. Exchange*

[61] 29 U.S.C. §142(2).

Parts Co., 375 U.S. 405, 409 (1964); *Lampi, L.L.C.*, 322 NLRB 502 (1993); *United Airlines Services Corp.*, 290 NLRB 954 (1988). There is an inference that benefits conferred during the critical period are coercive, but the employer may rebut this by showing that it had a valid reason separate and apart from the pending election, such as following an established practice. *Lampi*, supra; *Uarco*, 216 NLRB 1, 2 (1974). Whether the employer committed other unfair labor practices during the same time period is a relevant factor. *Lampi*, supra at 503.

Here, the policy handbook is silent on the matter of an employee receiving a pay raise for enrolling in an apprenticeship program. The Respondent submitted absolutely nothing in writing to establish that it had a policy of giving pay raises for that reason or that any other employees ever received them. In the absence of such evidence, and in light of the Company's commission of numerous unfair labor practices in September, I cannot conclude that the Respondent has rebutted the inference that the pay raises granted to Grunde and Thacker were designed to influence their votes in the election. Consequently, their pay increases constitute a ground for setting aside the election.[62] *Lampi*, supra.

Therefore, I sustain Objection 2.

Objection 3 relates to posting of the notice of election. Admittedly, ELC posted the notice to employees only in the main breakroom at the office and in the warehouse, where employees did not report before going to their jobsites. It did send, by certified mail, a letter to employees telling them the details of the election.

Section 103.20 (a) of the Board's Rules and Regulations, 29 C.F.R. § 103.20(a), provides that "Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 fully working days prior to . . . the day of the election." This requirement is mandatory in nature and may not be satisfied by alternative means of communication to employees. Thus, in *Terrace Gardens Plaza*, 313 NLRB 571, 572 (1993), the Board, in disagreement with the Regional Director, found an employer's mailing of the notice to employees in lieu of posting inadequate to satisfy the posting requirement. Here, ELC did not even mail the notice itself but instead communicated election details in letters that urged employees to vote against the Union.

The failure to comply with the notice requirement is an ipso facto ground for setting aside an election. No inquiry is made into whether the failure had any actual impact on whether employees voted. *Terrace Gardens Plaza*, supra at 572; *Smith's Food & Drug*, 295 NLRB 983 at fn.1 (1989).

Accordingly, Union's Objection 3 is sustained.

D. Violations of Section 8(a)(1) After the Election

Paragraph 5(g) relates to Swalley's conversations with Sanderson and Grunde on December 18, 2002, during their performance reviews. It is alleged in 5(g)(i) that Swalley interrogated employees about their union activities, and in 5(g)(ii) that he informed employees that employees would be laid off because of such activities.

Interrogation of employees is not per se unlawful. The Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Rossmore House*, 269 NLRB 1186 (1984). In *Rossmore House*, the Board held it was no violation to question open and active union supporters about their union sentiments, unaccompanied by threats or promises.

Sanderson initiated mention of the Union and opined that Patterson would not give him a fair review because of his union affiliation. Swalley replied this was nonsense. Sanderson stated he did not feel he had a future with the Company and would be selected for termination because of his union affiliation, to which Swalley responded, "Hogwash." It was then that Swalley kept asking Sanderson if he was so prounion, why he went to work for a merit shop.

Thus, Sanderson triggered the discussion about the Union and his union affiliation, Swalley denied there would be retaliation against him for that affiliation, and Swalley's questions did not seek any information but were merely rhetorical in nature. Even if Swalley's questions are characterized as "interrogation," under all the circumstances, such interrogation was not coercive.

However, when Sanderson asked whether there would be a layoff and what criteria would be used for selection for layoff, Swalley gratuitously responded that ELC would try to keep its "loyal" employees. This occurred after their lengthy discussion about the Union and immediately after Sanderson stated he was there to organize employees and Swalley's comment questioning whether it was fair that someone who just got hired could force other people to go union. In this context, Swalley's statement about keeping loyal employees logically referred to employees who did not support the Union, and was therefore not overly ambiguous. Accordingly, I conclude that Swalley's statement was coercive.

In contrast to Swalley's conversation with Sanderson, Swalley raised the subject of the Union in his conversation with Grunde, by asking the meaning of the letter announcing Grunde was a member of the organizing committee. Swalley expressed unhappiness about the organizing effort, undercutting his assurance to Grunde that the unhappiness was not directed against him. The conversation took place in the context of Grunde receiving his performance review. In all of these circumstances, I conclude that Swalley's interrogation was coercive and violated Section 8(a)(1).

Based on the above, I sustain allegation 5(g)(i) (interrogation of Grunde) and allegation 5(g)(ii).

Paragraphs 5(h) and (i) concern Swalley's conversations with All Trades employee Tucker on December 31, 2002, and January 8, 2003, respectively, and allege that Swalley informed employees they could not be hired on a permanent basis because ELC employees had engaged in union activity. Inasmuch as Swalley's conversations with Tucker concerned the latter's being employed by ELC, I will consider Tucker to have been an applicant for employment and thus to have occupied the status of employee for 8(a)(1) purposes. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *J. L. Philips Enterprises*,

[62] The General Counsel does not allege the pay increases as an unfair labor practice.

310 NLRB 11 (1993). The Respondent has not contended otherwise.

In the December conversation, Swalley stated that he wanted to hire Tucker and another All Trades employee but could not do so "because of all the union stuff." He further stated that the Union wanted to run him out of business. In the January conversation, Swalley volunteered that he wanted to hire Tucker and get rid of a couple of other people "for various reasons," but he could not just hire and fire whom he wanted because he was afraid of getting sued by the Union.

An analysis of whether Swalley's statements violated Section 8(a)(1), as with employer interrogation, hinges upon whether or not they were coercive. I deem it dispositive of this issue the fact that Swalley rarely engaged in conversation with Tucker but on those two occasions approached Tucker and accused the Union of being responsible for his not being able to obtain permanent employment with ELC. Swalley's statements had the natural effect of discouraging union activity or support, and, indeed, Tucker testified that he was afraid of voicing his prounion sentiments in response. I conclude, therefore, that Swalley's statements were coercive of Tucker's Section 7 rights, and I sustain the allegations in paragraphs 5(h) and (i).

Finally, the allegations in paragraphs 5(j)(i) and (ii) pertain to Swalley's conversation with Adair on March 10, 2003. Swalley told him that ELC was laying off employees and converting to the use of temporary labor services because of "pending lawsuits and the problems with the Union." I conclude that such statements were coercive and that these allegations therefore have been sustained.

E. Actions Taken Against Thacker After the Election

On September 26, 2002, Thacker received a written warning immediately upon returning from serving as the Union's observer at the election. The element of animus is established by violations of Section 8(a)(1) committed prior to September 26 by the Respondent. In any event, the timing of the issuance of the warning—on the same day Thacker served as the Union's observer—gives rise to the inference of animus. See *Olathe Healthcare Center*, 314 NLRB 54 (1994); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1354 (7th Cir. 1984). The General Counsel has therefore established a prima facie of discriminatory conduct under *Wright Line*.

As detailed earlier, Freese's testimony—credible in general—was markedly confusing and contradictory regarding why he issued Thacker a written warning on September 26 for what Thacker had allegedly done the day before. Further, it was not consistent with ELC's documentation of the incident. A company's shifting of reasons for imposition of discipline is frequently indicative of discriminatory motive. See, e.g., *Central Cartridge, Inc.*, 236 NLRB 1232 (1978). Moreover, this was the first occasion when either Passman or Swalley instructed Freese to prepare a formal written memorialization of an incident involving an employee coming in late, and no explanation was offered for this unusual step. It is also significant that Thacker had received no prior warnings, oral or written, for absenteeism or tardiness but was issued a written warning instead of a verbal one.

I conclude, therefore, that the Respondent has failed to meet its burden of persuasion of showing that Thacker would have received the written warning had he not engaged in union activity. Therefore, its issuance violated Section 8(a)(3) and (1).

The General Counsel also contends that Swalley's refusal to reassign Thacker to work at another jobsite on September 27 was discriminatory. Again, the General Counsel has established the elements of union activity, knowledge, and animus. The pivotal question here is whether the "action" element has been met, to wit, whether the General Counsel has shown that there was other work available to which Thacker was not assigned.

There is no dispute that it was raining on September 27, that no other employees besides Thacker were assigned to Indian Creek, and that there were previous occasions when Thacker was sent home on rain days rather than having been reassigned to work at other jobsites.

The fundamental problem is that the General Counsel has not established, let alone identified, other work that Thacker could have performed that day, either in terms of jobsites or number of hours. The Respondent has claimed there was none, and the General Counsel has provided no evidence to contradict that assertion. In these circumstances, I conclude that the General Counsel has failed to make a prima facie showing that the Respondent refused to reassign Thacker to available work and recommend that this allegation be dismissed.

F. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

The elements of union activity and employer knowledge thereof are satisfied for these employees by their agreeing to serve on the Union's organizing committee and by the Union's notification thereof to ELC. Swalley alluded to such notification when he spoke with Grunde on December 18. On that same day, Sanderson expressly told Swalley he was a union supporter. In terms of animus, I have found that agents of ELC committed numerous independent violations of 8(a)(1) in the time period from September 2002 to March 2003, including Swalley's interrogation of Grunde and his remark about loyal employees to Sanderson on December 18. All three employees were laid off. I conclude that the General Counsel has established prima facie cases of unlawful termination under *Wright Line*.

Turning to the Respondent's defenses for the layoffs, the Respondent submitted no documentation showing specifically what work levels were at the times of these layoffs and how they compared with work at the end of 2002.

Although Swalley testified that Sanderson and the other journeyman at Sunman were laid off on January 9 because work was slow, Corbly, the job supervisor, did not corroborate this justification. Certainly, Corbly had much more firsthand knowledge of the work at the site than Swalley, and his testimony seriously undermined the Respondent's proffered ground for Sanderson's layoff. Further, Sanderson testified that employee Hamilton was not laid off, even though he had had a break in service that caused him to have less seniority than Sanderson. The handbook provision on break in service, on its face, supports Sanderson's assertion. The Respondent did not

controvert Sanderson's testimony and, indeed, offered no evidence at all on this point.

According to Swalley, Trinosky was a supervisor at the time of his layoff on February 5, and the Respondent no longer needed his services. Inasmuch as Trinosky was replaced as supervisor by Patterson the previous December, this asserted justification must fail. The Respondent has not provided any other reason for why Trinosky was selected for layoff.

Finally, as to Grunde, on February 17, the day he was laid off, ELC retained five employees with less seniority who were making the same or a higher hourly rate than he was. Swalley testified Grunde was laid off because work at the site was "a little slow" and because he considered Grunde to lack mechanical abilities. As previously stated, the latter reason is undermined by the fact that Grunde had been employed since June 2002, and never received any verbal or written warnings concerning the quality of his work. The Respondent offered no other reasons for why he was chosen for layoff.

In the absence of supporting documentation, conflicting statements from the Respondent's witnesses as to the volume of work in early 2003, and the Respondent's failure to establish bona fide reasons why Sanderson, Trinosky, and Grunde were selected for layoffs, I conclude that the Respondent has failed to meet its burden of persuasion of showing that they would have been laid off but for their having engaged in union activities. Accordingly, their layoffs violated Section 8(a)(3) and (1).

G. The Transition to Labor Providers in March 2003

At the time of the transition on March 14, 2003, the Union's objections to the election were still pending before the Regional Office. The Respondent had already committed numerous unfair labor practices, including the recent layoffs of Sanderson, Trinosky, and Grunde. Swalley had told employees Adair and Grow on March 10 that ELC was laying them off and changing to the use of labor providers because of pending lawsuits and problems with the Union. Prior to March 2003, the Respondent had used employees of labor providers only on an as-needed basis, to supplement the work of regular ELC employees. After March 14, most of the work on ELC jobs were performed by electricians who had been previously employed by ELC, and they continued under the supervision of ELC supervisors. Some continued on the same ELC jobsites where they had worked prior to March 14. Managers, supervisors, and office personnel all remained in ELC's employ after March 14. In sum, very little changed after the transition other than the elimination of electrical employees as ELC employees.

In light of these factors, I conclude that the General Counsel has established a prima facie case that ELC laid off its employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees.

Calvert alone made the decision to eliminate ELC employees who performed electrical work and to switch to the use of labor contractors. As I previously detailed, his testimony on the reasons he made the decision—and his testimony in general—was evasive, inconsistent, and contradicted by other agents of the Respondent.

Specifically as to why he made the decision, Calvert gave three reasons during the course of his testimony. He initially testified it was for increased productivity and profitability, but he offered no elaboration on how the transition would accomplish this. Later, he testified the reason was because "our workload was down," an assertion directly contradicted by Passman, vice president of operations, who testified that the workload at the time of the transition was substantially the same as before. General Superintendent Swalley's testimony that he was very surprised to learn of the transition also implicitly contradicts Calvert's assertion that workload was a bona fide reason for the transition. Still later in his testimony, Calvert stated that the transition was made because he did not feel his administrative staff could keep up with "so many employment laws and regulations," again offering no elaboration. As noted earlier, a respondent's offering shifting reasons for its actions frequently reflects discriminatory motive. Cf. *Central Cartridge*, supra.

In conclusion, Calvert's testimony on the transition was wholly unreliable and utterly failed to rebut the General Counsel's prima facie case that the layoffs of employees and switch to labor providers was motivated by legitimate business considerations rather than antiunion animus.

I conclude, accordingly, that the layoffs of ELC employees on March 14, 2003, and their having to work for ELC thereafter through labor providers violated Section 8(a)(3) and (1).

Conclusions—Case 25–RC–10131

I recommend that the challenges to the ballots of Christine Patterson a/k/a Christine Rossittis, Jason Dunn, Brad Krebbs, Corey Leineweber, George Nichols, and Robert Nichols be sustained and their ballots not opened or counted.

I recommend that Union's Objections 2 and 3 be sustained and that the election held on September 26, 2002, be set aside, and a new election ordered, due to objectionable conduct of the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Promulgated and maintained a rule prohibiting employees from discussing or soliciting on behalf of the Union.

(b) Suggested physical violence against employees because they supported the Union.

(c) Denigrated employees because they supported the Union.

(d) Instructed employees not to discuss the Union with other employees.

(e) Isolated employees from other employees because of their support for the Union.

(f) Solicited employees to quit employment because they supported the Union.

(g) Created the impression among employees that their union activities were under surveillance.

(h) Interrogated employees concerning their union activities and sympathies.

(i) Told employees they would be laid off because of their union activities.

(j) Told prospective employees they could not be hired because the Respondent's employees had engaged in union activity.

(k) Told employees they were being laid off and would be required to work through a labor provider because they engaged in union activity.

4. By assigning more onerous working conditions to Jason Dunn and Corey Leineweber; by issuing written discipline to Demarco Thacker; by laying off employees Bruce Sanderson, Jonathan Trinosky, and Mikalis Grunde; and by laying off all remaining employees and requiring them to apply for employment through a labor provider, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel seeks an order requiring the Respondent to reinstitute its practice of employing employees as it existed prior to January 8, 2003, the date Sanderson was laid off. Such an order is warranted, but the Respondent actually changed its practice at the time of the transition, when it switched to the exclusive use of labor providers. Accordingly, March 14, 2003 is the appropriate operative date.

The General Counsel also seeks expungement from the Respondent's records of any references to the unlawful written discipline issued to Thacker and to the unlawful layoffs of Sanderson, Trinosky, Grunde, and all remaining employees on March 14, 2003.

The General Counsel has not requested a broad cease and desist order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[63]

ORDER

The Respondent, E.L.C. Electric, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from discussing or soliciting on behalf of the Union.

(b) Suggesting physical violence against employees because they support the Union.

(c) Denigrating employees because they support the Union.

(d) Instructing employees not to discuss the Union with other employees.

(e) Isolating employees from other employees because of their support for the Union.

(f) Soliciting employees to quit employment because they support the Union.

(g) Creating the impression among employees that their union activities are under surveillance.

(h) Interrogating employees concerning their union activities and sympathies.

(i) Telling employees they will be laid off because of their union activities.

(j) Telling prospective employees they cannot be hired because ELC employees engaged in union activity.

(k) Telling employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

(l) Assigning more onerous working conditions to employees because of their union activities.

(m) Issuing written warnings to employees because of their union activities.

(n) Laying off employees because of their union activities.

(o) Requiring employees to apply for employment through a labor provider.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used in any way against them.

(d) Within 14 days of the Board's Order, remove from its files any reference to the unlawfully written warning issued to DeMarco Thacker on September 26, 2002, and within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used in any way against him.

[63] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Reinstitute its practice of employing electrical employees as it existed prior to March 14, 2003.

(g) Within 14 days after service by the Region, post at its facility in Indianapolis, copies of the attached notice marked "Appendix."[64] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 12, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the proceeding in Case 25–RC–10131 be severed and remanded to the Regional Director for Region 25 for further action consistent with this Decision.

Dated, Washington, D.C. April 7, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing or soliciting on behalf of the International Brotherhood of Electrical Workers, Local Union No. 481 (the Union).

WE WILL NOT suggest physical violence against employees because they support the Union.

WE WILL NOT denigrate employees because they support the Union.

WE WILL NOT instruct employees not to discuss the Union with other employees.

WE WILL NOT isolate employees from other employees because of their support for the Union.

WE WILL NOT solicit employees to quit employment because they support the Union.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT interrogate employees concerning their union activities and sympathies.

WE WILL NOT tell employees they will be laid off because of their union activities.

WE WILL NOT tell prospective employees they cannot be hired because our employees engaged in union activity.

WE WILL NOT tell employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

WE WILL NOT assign more onerous working conditions to employees because of their union activities.

WE WILL NOT issue written warnings to employees because of their union activities.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT require employees to apply for employment through a labor provider.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and WE WILL, within 3 days thereafter notify each of them in writing that this has been done and that the layoffs will not be used in any way against them.

[64] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to DeMarco Thacker on September 26, 2002, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used in any way against him.

WE WILL reinstitute our practice of employing electrical employees as it existed prior to March 14, 2003.

E.L.C. ELECTRIC, INC.